

Law Enforcement Labor Services,)	ARBITRATION AWARD
the Union)	
)	
-and-)	Jorgensen Grievance
)	
City of Roseville,)	BMS Case No. 06-PA-0161
the Employer.)	

Arbitrator: Barbara C. Holmes

Hearing Date: August 9, 2006

Post Hearing Briefs due: August 28, 2006

Date of Decision: September 8, 2006

Appearances:

For the Union: Tiffany L. Schmidt, Staff Attorney
Law Enforcement Labor Services

For the Employer: Pamela R. Galanter
Frank Madden & Associates

INTRODUCTION

Law Enforcement Labor Services (herein, the Union), as the exclusive representative, brings this grievance challenging a one-day suspension given to Canine Officer John Jorgensen (herein, the Grievant) by the City of Roseville (herein, the Employer). The Employer contends that it had just cause to impose the discipline. An arbitration hearing was held at which both parties had a full opportunity to present evidence through the testimony of witnesses, the introduction of exhibits and the submission of post-hearing briefs.

ISSUE

Did the Employer have just cause to impose a one-day suspension upon the Grievant? If not, what is the appropriate remedy?

FACTUAL BACKGROUND

On May 11, 2005, a funeral was conducted for a City of St. Paul police officer who was shot and killed in the line of duty. Because most of the police officers from the City of St. Paul Police Department would be attending the funeral, other jurisdictions were requested to provide patrol officers with patrol cars who would handle the City of St. Paul's normal law enforcement duties during the funeral. It is also customary in the law enforcement community for neighboring jurisdictions to send a contingent of their law enforcement officers to a slain officer's funeral. Typically the contingent is dressed in the same uniform so as to appear as a unit. Roseville Police Chief Carol Sletner determined that her department's officers attending the funeral would wear their "winter uniform" consisting of a long-sleeved dark shirt and tie, dark pants and a hat.

Numerous officers from the City of Roseville Police Department volunteered to either attend the funeral or provide patrol coverage. The Grievant, a Canine Officer who partners with a trained dog, very much wanted to attend the funeral; however, he did not have the dark uniform pants that officers attending the funeral had been ordered to wear. On May 10, 2005, the Grievant met with Capt. Mathwig to see if he could instead wear his formal "Honor Guard" uniform or wear pants that were similar to the designated uniform but that had cargo pockets. Capt. Mathwig did not think that an exception would be allowed, but said he would talk to Chief Sletner.

As an alternative to attending the funeral, Capt. Mathwig and the Grievant discussed the possibility of the Grievant providing patrol coverage for the City of St. Paul during the funeral. Capt. Mathwig stated that he did not see why the City of St. Paul would not want another Canine Officer on site. The discussion was ended with Capt. Mathwig indicating that he would get back to the Grievant after he talked to Chief Sletner.

The Grievant testified that he left the meeting with the understanding that he had at the least been authorized to provide patrol coverage, but possibly might be able to attend the funeral if Chief Sletner allowed an exception to the required uniform. Capt. Mathwig testified that he did not intend to authorize the Grievant to do either; rather, his plan was to check with Chief Sletner about an exception to the uniform requirement and check with the City of St. Paul to

determine if they could use a Canine Officer. However, Capt. Mathwig did neither. Upon further thought he decided that Chief Sletner would not change her mind about the designated uniform. He also decided that it was not a good idea to send a Canine Officer to St. Paul because the dog occupies the back seat of the patrol car thereby preventing the confinement of arrestees. This would necessitate an additional patrol car to come to the scene of the arrest. Because the Grievant was scheduled to work the 10:30 p.m. shift that evening, Capt. Mathwig left a voice mail message on the Grievant's work telephone around 10:00 p.m. informing him that he could not attend the funeral in a different uniform or provide patrol coverage for the City of St. Paul.

Because the Grievant believed that he had been authorized to provide patrol coverage the following day or, with Chief Sletner's approval, might be allowed to attend the funeral, he requested and was granted leave by his supervisor, Matthew Marshall, from the 10:30 p.m. shift he was scheduled to work that evening. For that reason he did not hear the voice mail message left by Capt. Mathwig at 10:00 p.m. that evening on his work phone.

At 6:30 a.m. the following morning, the City of Roseville police officers providing patrol coverage for the City of St. Paul arrived at the Roseville police station. Because the Grievant had not heard back from Capt. Mathwig he assumed that Chief Sletner had not approved his request to attend the funeral in a different uniform. He therefore appeared for duty in his patrol uniform, with his dog and traveled to St. Paul with his fellow officers to provide patrol coverage. Later that morning Capt. Mathwig arrived at the police station and saw the Grievant's name on the "On Duty" board indicating that he was working in St. Paul. He called the Grievant's personal cell phone and told him he was not authorized to conduct patrol coverage and that he should return to Roseville immediately, which the Grievant did. Later that day, when the City of St. Paul realized that it needed back-up patrol coverage longer than it had planned, the Grievant was authorized to return to St. Paul and provide the needed coverage.

On June 6, 2005, the Grievant was given a one-day suspension for failing to "follow Roseville Police Department policy #12.1/3 A. Obedience to Orders, when he self authorized himself to assist St. Paul Police in coverage of there [sic] City on 05/11/2005, at 0700 hours." The grievance was heard and denied by the Employer at the 2nd and 3rd Steps and subsequently appealed to arbitration.

POSITIONS OF THE PARTIES

Employer: The Employer states that Directive 12.1/3.A, Obedience to Orders, contained in the police department's Rules of Conduct, is a policy that all of its police officers, including the Grievant, must follow. The policy states, in part:

Members of the department are required to obey any lawful order of a superior including any lawful order relayed from a superior by an employee of the same or lesser rank.

The Employer notes that this policy does not require the officer giving an order to identify his/her instruction or directive as a "direct order" before the subordinate is required to comply.

The Employer argues that at the May 10, 2005, meeting Capt. Mathwig clearly instructed the Grievant to wait for his call as to whether he could go to the funeral in a different uniform or whether he could assist the City of St. Paul by providing patrol coverage during the funeral. The Employer contends that the Grievant intentionally violated this order the following morning when he went with the other Roseville police officers to provide patrol coverage.

To support its contention that Capt. Mathwig was clear in his instructions to the Grievant, the Employer points to Capt. Mathwig's investigative report and the 3rd Step Grievance response. The Employer also argues that the Grievant has never stated what Capt. Mathwig said that led him to believe he was authorized to provide patrol coverage. The Employer argues that conflicts in testimony between a grievant and a managerial witness should be resolved in favor of management because the grievant has the most to lose and therefore has more incentive to distort the truth. The Employer also asserts that the Grievant's last minute decision not to work his scheduled shift can be seen as a means to avoid receiving a phone call from Capt. Mathwig and subsequently claim a misunderstanding or miscommunication.

The Employer argues that given the Grievant's disciplinary history of two previous written reprimands, a one-day suspension is an appropriate level of discipline for disobeying an order. It believes that the Grievant has demonstrated a pattern of "disregard for directives."

Union: The Union faults the Employer for not conducting a proper investigation of this matter. It believes that the Grievant's statement should have been taken prior to a decision being made about discipline. The Union claims that because Capt. Mathwig's version of the

events of May 10, 2005, provided the sole basis to discipline the Grievant, the process was unfair and not objective.

The Union argues that there was a miscommunication between Capt. Mathwig and the Grievant during their discussion on May 10, 2005. It states that the Grievant believed he had received permission to provide patrol coverage in St. Paul the next day. Because of the misunderstanding, the Union argues that the Grievant did not intentionally disobey an order and therefore should not be disciplined. The Union notes that the Grievant has no history of failing to follow orders.

The Union also believes that the Employer did not take the Grievant's outstanding work record into account in making its decision regarding discipline. It believes that the most that should happen to the Grievant is to be given a counseling session regarding the miscommunication.

DISCUSSION AND OPINION

Section 10.1 of the parties' collective bargaining contract that was in effect when the Grievant was disciplined states as follows:

The EMPLOYER will discipline employees for just cause only. Discipline will be in one or more of the following forms:

- a) oral reprimand;
- b) written reprimand;
- c) suspension;
- d) demotion; or
- e) discharge

The analysis to determine whether or not just cause exists typically involves two distinct steps. The first step is to determine whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If the alleged misconduct is established by a preponderance of the evidence, the next step is to determine whether the level of discipline imposed is appropriate, taking into account all of the relevant circumstances. *See Elkouri & Elkouri, How Arbitration Works, pg. 905 (5th ed. 1997).*

The Employer is asserting that the Grievant intentionally disobeyed an order. The Grievant is claiming that because of the miscommunication between the parties, he did not

intentionally disobey an order. There are only two plausible explanations for the Grievant's actions in this matter – he either 1) understood Capt. Mathwig's instructions but disregarded them and is being untruthful, or 2) genuinely believed that he had received permission to provide patrol coverage in St. Paul.

There is no dispute about what Capt. Mathwig intended to communicate to the Grievant. He intended that he would let the Grievant know later in the day whether he could attend the funeral or provide patrol coverage. His plan was to talk to Chief Sletner regarding the uniform issue and talk to the City of St. Paul about sending a Roseville Canine Officer - the Grievant – to provide patrol coverage the following day. But the issue is not what he intended – the issue is whether or not there is a preponderance of evidence indicating that Capt. Mathwig clearly communicated his intent to the Grievant.

There is no tape recording of or other witnesses to the May 10, 2005, discussion between the Grievant and Capt. Mathwig. We must rely upon their recollections. In Capt. Mathwig's investigative report dated June 7, 2005, and in his direct testimony he expressed a strong and sincere belief that he communicated clearly. He used phrases like "I made it perfectly clear" and "I made it obvious." However, the Grievant gave a plausible explanation as to why he thought Capt. Mathwig had authorized him to provide patrol coverage in St. Paul. He testified that in his May 10, 2005, discussion with Capt. Mathwig they initially talked about which uniform had to be worn to the funeral. The Grievant stated that he was displeased he could not attend the funeral in a different uniform and asked to speak directly to Chief Sletner. Capt. Mathwig said he would talk to Chief Sletner himself about the issue and get back to the Grievant. The Grievant testified that next they discussed the issue of the Grievant providing patrol coverage in St. Paul. Both the Grievant and Capt. Mathwig testified that Capt. Mathwig said something to the effect of "I can't see why St. Paul wouldn't want another officer." The Grievant testified that he took that statement to mean he would be providing patrol coverage unless Chief Sletner told Capt. Mathwig he could wear a different uniform to the funeral.

The Employer argues that Capt. Mathwig's investigative report is the only documentation that was prepared "close in time to the incident and should be taken as the best evidence of what Capt. Mathwig said." I do not find this to be a persuasive argument. The incident happened on May 10, 2005, yet the investigative report is dated June 7, 2005. I do not find this to be "close in time." It is also curious that the Grievant's disciplinary letter is dated June 6, 2005, and signed

by his supervisor on June 6, 2005, yet the investigative report is dated June 7, 2005. The investigative report appears to have been created after the decision was made to discipline the Grievant. This report does little to support the credibility of Capt. Mathwig's testimony.

The Employer's investigation is also flawed in that there is no sound reason not to have taken the Grievant's statement prior to making a decision about discipline. Capt. Mathwig testified that he did not take the Grievant's statement because he believed the situation to be "cut and dry and plainly obvious." But what is clear to the speaker is not necessarily clear to the listener. A fair and objective investigation necessitated a statement from the Grievant within a reasonable time of the alleged inappropriate behavior.

The flawed investigation does not, in and of itself, invalidate the discipline. However, it does not assist and perhaps harms the Employer's ability to prove its case by a preponderance of the evidence.

I find it significant that after his discussion with Capt. Mathwig the Grievant made arrangements to take leave from the 10:30 p.m. shift he was scheduled to work on May 10, 2005. This action supports his belief that Capt. Mathwig had given him permission to provide patrol coverage that following day. I also find significant the fact that the Grievant showed up at the Roseville police station at 6:30 a.m. the following morning and traveled to St. Paul with the other officers who were providing patrol coverage. If he was truly disobeying Capt. Mathwig's order it would be unlikely for him to have openly appeared at the station and risk running into Capt. Mathwig. Lastly, there was no evidence submitted showing that the Grievant has a history of failing to follow orders or being untruthful. To the contrary, his performance evaluations are very positive and his personnel file contains many letters of commendation from the public.

In conclusion, the only credible evidence to support the Employer's position is the testimony of Capt. Mathwig. But the Grievant offered a plausible explanation of how the confusion arose. His subsequent actions support the credibility of his explanation. For those reasons the Employer has failed to show by a preponderance of the evidence that it had just cause to discipline the Grievant.

AWARD

The grievance is sustained. The one-day suspension shall be removed from the Grievant's personnel file and he shall be made whole for all lost pay and benefits.

DATED: _____

Barbara C. Holmes
Arbitrator